

February 27, 2004

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

McNEIL-PPC., et al.

Plaintiffs,

vs.

MERISANT COMPANY, et al.

Defendant.

CV. 04-1090 (JAG)

FURTHER PRELIMINARY INJUNCTION

held before the HONORABLE JUDGE JAY A. GARCIA GREGORY
on Friday, February 27, 2004, at 10:15 a.m.

FOR THE PLAINTIFFS:

STEVEN ZALESIN, ESQ.

KARLA SANCHEZ, ESQ.

FOR THE DEFENDANTS:

GREGG F. LOCASCIO, ESQ.

HERIBERTO BURGOS, ESQ.

JOYCE DEL VALLE (787)772-3377

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Q. Can you give us a brief summary first of your
educational background?

A. I have a B. S. in Economics from the Wharton
School of the University of Pennsylvania; an M.B.A.
degree from the Graduate School of Business at New York
University; and a Ph.D. degree in Business
Administration from Penn State, with a major in
marketing and a minor in social psychology and
statistics.

Q. Prior to going over to the American University
in academia, what were you doing in your professional
career?

A. I had taught previously at the University of
Florida and taught there for five years. And that was
my other academic position.

And I have also had positions in industry and
government. I worked in marketing research for
Warner-Lambert Pharmaceutical Company where I conducted
surveys and did other work related to marketing.

I worked for three years at the Food and Drug
Administration and Federal Trade Commission in
Washington and conducted a lot of survey work for them.

And for about the last 15 or 20 years I've
done a lot of consulting for the government. Up until
even just recently I've worked a day a week at the

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THE COURT: Good morning. We'll hear your
next witness.

MR. ZALESIN: Thank you, Your Honor.

McNeil calls Professor Michael Mazis.

Thereupon,

MICHAEL MAZIS

was called as a witness and, after having been first
duly sworn, was examined and testified as follows:

MR. ZALESIN: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. ZALESIN:

Q. Good morning, Professor Mazis.

A. Good morning.

Q. What do you do for a living, sir?

A. I'm a professor of marketing in the School of
Business at American University in Washington D. C.

Q. What kind of courses do you teach at American
University?

A. I've taught courses in marketing research,
consumer behavior, marketing management, principles of
marketing, Internet marketing, and a couple of other
courses.

Q. How long have you been at American University?

A. About 25 years.

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Federal Trade Commission.

And I've done work for the Food and Drug
Administration; consumer Product Safety Commission;
U.S. Mint; Bureau of Alcohol Tobacco and Firearms;
State of California.

I've conducted surveys for all the those
organizations.

Q. Can you just give one or two examples of the
kind of work you have done for the last, say, five
years for the Federal Trade Commission?

A. Well, right now, actually I have a study
that's going to trial that involves a product called
Abforce. It's one of these abdominal belts that you
put around your abdomen and they vibrate and supposedly
you will lose inches and lose weight as a result of
using that. That's a false advertising case. So I
conducted a survey for the F.T.C., and I'm going to be
testifying on that shortly.

Q. Let me show you Plaintiff's Exhibit 55.

(Document handed to the witness.)

Is Exhibit 55 a copy of your curriculum vitae?

A. Yes.

Q. Let's talk about your work on this case.
First, when were you first contacted about getting
involved in any way in this proceeding?

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1 A. It was Thursday, February 12th. It was about
 2 two weeks -- I guess that would be 15 days ago.
 3 Q. Who contacted you?
 4 A. Karla Sanchez from Patterson Belknap.
 5 Q. So you can't blame me.
 6 (Laughter.)
 7 What were you asked to do? What did she ask
 8 you do?
 9 A. She asked, first of all, if I had the time to
 10 work on a project that needed to be completed in a very
 11 short period of time. And I said I could move some
 12 things around and work on it. And she described it as
 13 a conducting a secondary meaning survey that involved
 14 the product called SPLENDIA.
 15 Q. Have you been involved in trademark cases
 16 before? Had you heard of secondary meaning?
 17 A. Yes.
 18 Q. What did you understand the objective of this
 19 kind of survey to be?
 20 A. My understanding was it was, they wanted to
 21 conduct the survey among no-calorie sweetener
 22 purchasers in Puerto Rico. And the idea was that when
 23 people would view the trade dress of SPLENDIA, whether
 24 people would know that the trade dress was associated
 25 with a single source or a single brand and whether that

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1 they say SPLENDIA, then that's what you might consider
 2 the "noise rate."
 3 Q. So if I understand correctly, in order to
 4 create this, a stimulus is the thing you showed to the
 5 people in the survey?
 6 A. Yes.
 7 Q. In order to create the stimulus you would
 8 start with the actual SPLENDIA package that's in
 9 evidence, Plaintiff's Exhibit 1?
 10 A. Yes.
 11 Q. You have one of those in front of you.
 12 And then the idea is to remove the brand name
 13 or the other text that identifies the product, just
 14 leaving the trade dress?
 15 A. Right. And so what we did was we took the
 16 SPLENDIA and left on the yellow and the cloud around the
 17 name, left on -- it was a no-calorie sweetener; left on
 18 the coffee cup with the packet and the iced tea, but
 19 delete everything else: deleted the name --
 20 Q. Let me stop you for a second and let's move
 21 this into evidence, Plaintiff Exhibit 49 and 49A as a
 22 two-dimensional version of it. Maybe we could hand one
 23 of it up to the Court as you describe it.
 24 MR. ZALESIN: Do you want to give one to Judge
 25 Garcia?

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1 brand was SPLENDIA.
 2 Q. Is there a standard methodology that's used to
 3 assess that?
 4 A. There is, and it's been written about a lot.
 5 And Vincent Paladino is certainly one source of that.
 6 Q. How generally is it done?
 7 A. Well, generally the way the surveys are done
 8 is that you remove the identifying information that
 9 would describe the product. And so you show people,
 10 say, this package, and it only has the trade dress; it
 11 doesn't have the identifying information.
 12 And then you see, you ask people if they know
 13 who put out this product and whether this product was
 14 put out by just a single company, a single source.
 15 And then typically you would have a control
 16 product that you would use also that would have
 17 different trade dress to determine whether people might
 18 be guessing. Because in this case one issue is that
 19 SPLENDIA is well known. So there is a certain
 20 percentage of people who could look at any package and
 21 just guess that it was SPLENDIA just based on the fact
 22 that it's one of the market leaders. And that would
 23 just come at the top of their mind.
 24 So the idea is you give people a more neutral
 25 stimulus that doesn't look like the SPLENDIA box, and if

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1 (A box and a document handed to the
 2 judge.)
 3 You were describing the stimulus that was
 4 used?
 5 A. Right. It's a very simple process. It's
 6 simple if you can have access to the boxes. But any
 7 way you just merely eliminate all the product
 8 identifying information, and you leave on the trade
 9 dress. And essentially if people look at this package
 10 and they identify whether this is identified with a
 11 single source or brand and what the brand is.
 12 So this survey is very straight forward.
 13 Q. You mentioned also a control package. Can you
 14 explain again what that's about?
 15 A. Right. Well, as I mentioned before, we wanted
 16 to pick a stimulus that didn't look like SPLENDIA to try
 17 to control for noise and in this case for guessing. So
 18 this was the package that was selected.
 19 MR. ZALESIN: Let's put that in evidence,
 20 Plaintiff Exhibit 50.
 21 (Document and box handed to the witness.)
 22 Q. So before we get to Exhibit 50, you have in
 23 front of you Plaintiff's Exhibit 51, the red and white
 24 box that says SPLENDIA on it?
 25 A. Right.

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1 Q. Can you explain what Exhibit 51 is? It's
2 already in evidence.

3 A. Right. When I got involved in this study, one
4 thing that I insist on is that we have some kind of
5 control product, if that's at all possible. And I
6 directed Johnson & Johnson to try to find me something.
7 And they came up with this package that had been sold
8 on the Internet. It wasn't sold in Puerto Rico. So
9 this would be a package Puerto Rican no-calorie
10 purchasers, they wouldn't be familiar with it, they
11 wouldn't associate it with SPLENDIA.

12 So the idea was to take this box, use this as
13 a control. It obviously doesn't have the yellow and it
14 doesn't have the cloud and it doesn't have the
15 gradation in the blue that's in the name. It's totally
16 different. And to give people this box, only delete
17 the brand information and see how many people
18 identified this as SPLENDIA. So in that way we can see
19 'these people must be guessing.'

20 Q. Okay. And that's Plaintiff's Exhibit 50,
21 that's the so-called "control stimulus" that was
22 created?

23 A. Yes.

24 Q. How many people were interviewed in each
25 group, the group that saw the yellow SPLENDIA trade

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1 you're asking it?

2 A. Right. Well, some of these are sort of
3 standard questions that you ask in these screening
4 questions. question A asks whether people work in
5 certain occupations.

6 The idea here is to eliminate any people that
7 might have some specialized knowledge, such as for
8 example, if somebody worked at a store or a company
9 that sells food products that might know more than the
10 average person.

11 B, we want to get people who aren't
12 professional marketing research survey participants.
13 So we sort of eliminate those in B.

14 Q. So if people answer yes to those kinds of
15 screening questions, they are automatically out of the
16 survey?

17 A. Yes.

18 Q. And they wouldn't be included in the 200 that
19 you mentioned earlier?

20 A. No.

21 Q. So let's go on to the next page, Question C.

22 A. Question C. indicates -- we are looking for
23 people in certain age categories. And the idea is to
24 look at the market for no-calorie sweetener purchasing
25 and to try to match the demographic characteristics in

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1 dress and the group that saw the control trade dress?

2 A. About 200 saw what we call the "test product,"
3 the SPLENDIA product at issue, the yellow box; and 100
4 were exposed to the control product, the red, white and
5 blue product.

6 Q. Who prepared the questionnaire, the questions
7 that is were asked of the people who participated in
8 the survey?

9 A. I did.

10 Q. Let me show you first Plaintiff's Exhibit 57.

11 (Document handed to the witness.)

12 (Publishing on the monitor.)

13 Would you tell us what Exhibit 57 is?

14 A. Excuse me. I have three copies.

15 Q. Can we give some to the Court?

16 (Copy given to the Court.)

17 A. This is the screener.

18 Q. What is a screener?

19 A. A screener is a questionnaire that's developed
20 in which you screen people to find people who are
21 eligible to do the study, that they meet certain
22 eligibility characteristics.

23 Q. And there are a series of questions in the A
24 through E here on the screen. Can you just take us
25 through them and explain what you're asking and why

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1 terms of the age and also gender to what the market is
2 in Puerto Rico. So that's what that's used for.

3 Q. How about the next screening question,
4 Question D?

5 A. Questions D and E, there are the most
6 important questions, because here we are trying to come
7 up with people who are regular purchasers of no-
8 calorie sweeteners. That's the pertinent market here.

9 So D asks about products that you yourself
10 have purchased in the past three months; and E,
11 products that you expect to purchase in the next three
12 months. And some of them would have to answer yes to
13 the no-calorie sweetener part of that to qualify.

14 Q. Okay. And if they give the right responses to
15 all of these five screening questions, that is, they
16 are not employed by a food company and they buy
17 no-calorie sweeteners on a regular basis, are they then
18 invited to participate?

19 A. They are, with the exception of the last
20 questions here.

21 Q. All right. Questions F through H. I'm sorry.
22 So what are those about?

23 A. F and G is the eyeglasses and contact lenses.
24 Obviously, if some person forgot to bring glasses,
25 didn't have the glasses at the time and couldn't read

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1 the package very clearly, then obviously we wouldn't
2 want that person in the study.

3 Q. Okay. And then if the person passes through
4 the screener and agrees to participate in the survey,
5 they are then administered an additional questionnaire?

6 A. Yes, the main questionnaire in the study.

7 MR. ZALESIN: May I have Exhibit 59, please?

8 Q. Who prepared the main questionnaire in this
9 survey?

10 A. I did.

11 (Document handed to the witness and to
12 the Court.)

13 Q. So once again, Professor Mazis, would you just
14 kind of briefly take us through this questionnaire,
15 specifically the questions you're asking and the
16 purpose of why you're asking them?

17 A. Okay. First, there is a brief introduction
18 that says there are no right or wrong answers to my
19 questions, I just wanted to know what you think and
20 what your opinions are, and if you don't have an
21 opinion or don't know an answer, please tell me.

22 These are basically the standard questions
23 that you ask in any of these types of surveys.

24 Question 1 says -- you're in front of the
25 respondent, and you say, "Here is a package of

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1 is "no opinion."

2 Among those, which people are invited to go
3 further and which people are removed from the survey?

4 A. You can see to the left, next to each
5 response. It indicates where the interviewer is
6 supposed to go. It's kind of a direction to the
7 interviewer. So it says, "If the person says yes, go
8 to Question 1," which is the main follow up. And, "if
9 the person answers no, don't know, or no opinion, then
10 they go to Q5," which is basically the end. They are
11 basically thanked and that's the end of it.

12 Q. So those people that answered yes to Question
13 1, what happens next?

14 A. Then they are asked Question 2, "Have you seen
15 or purchased only one brand or more than one brand of
16 no-calorie sweetener that looks like the one I showed
17 you, or don't you know?"

18 Q. What is the purpose for that question?

19 A. That's one of the two key questions, because
20 it's determined whether people identify the trade dress
21 with a single source or multiple sources.

22 Q. And for those people who say "one brand," they
23 go where? According to the instructions they go to
24 Question 3?

25 A. Yes, they go to Question 3. And the people

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1 no-calorie sweetener with the brand name removed.

2 Please look at the package as you would if you saw it
3 in the store."

4 And then the interviewer hands the package to
5 the respondent. And it says, "Hand the package and
6 permit him or her to handle and examine. After
7 respondent has examined the package, remove from sight
8 and continue."

9 Then the first question is asked, "Have you
10 ever seen or purchased a no-calorie sweetener that
11 looks like the one I showed you or don't you know?"

12 Q. Why do you want to ask that question?

13 A. If people are totally unfamiliar with this
14 package, you want to try to reduce guessing. So this
15 one way to do that.

16 Q. If they are not familiar, that's it, the
17 survey is over?

18 A. It's over for them, yes.

19 Q. For those people who say they are familiar
20 with it, what happens next?

21 A. Then the second question is asked.

22 Q. Let me stop there. There are actually four
23 possible responses that are printed on the
24 questionnaire in response to Question 1. There is
25 "yes," there is "no," there is "don't know," or there

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1 that said "more than one brand," they go to Question 4,
2 which is actually a similar question but it's slightly
3 different wording to it.

4 And then Question 5 -- I mean, "don't know or
5 no opinion," they go to Q5, which is they are out of
6 the survey at that point because they don't know, they
7 don't have an answer. So their answers are not
8 pertinent at this point.

9 Q. Okay. Let's go on to Question 3. This is the
10 one that's asked of people who say "one brand" in
11 response to Question 2?

12 A. Right.

13 Q. What is Question 3?

14 A. Question 3A, it says, "What do you think is
15 the brand name of the no-calorie sweetener that I
16 showed you?"

17 And the interviewer is just supposed to record
18 that. It's very straight forward; a very simple
19 question.

20 And then "Why do you think that?" And people
21 say things like "the color" or "the design of the
22 package" or something like that.

23 And then it says, "After asking Questions 3A
24 and 3B, go to 5." In other words, the person is
25 finished, and that's it. It's a very simple survey.

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1 Q. For those people who say "more than one brand"
2 in response to Question 2, they get Question 4 instead
3 of 3?

4 A. Yes. Question 4A is exactly the same as 3A,
5 except it says "What do you think are the brand names?"

6 Q. So it's plural?

7 A. It's plural. That's the only difference.

8 Q. Okay. And the same thing, "Why do you think
9 that?"

10 A. "Why do you think that?" That's question is
11 the same.

12 Q. And then that's it, the survey is over?

13 A. That's it. That's the whole survey.

14 Q. I assume you prepared these questionnaires in
15 English. Is that right?

16 A. Yes, I prepared them in English.

17 Q. Were they then translated into Spanish?

18 A. Yes.

19 MR. ZALESIN: May I have Exhibit 61, please?
20 (Documents handed to the witness and to
21 the Court.

22 Q. Have you seen Exhibit 61 before?

23 A. Yes.

24 Q. Are these the Spanish versions of the
25 questionnaire that were used in the survey?

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1 to explain here. We decided it would be quite useful
2 to do an island-wide study. We didn't want to just
3 talk to people in, say, just in San Juan. They might
4 be more urbanized and might be different than people in
5 other areas. So we decided to interview people in six
6 different parts of the island. So we wanted to get
7 that geographic diversity.

8 Q. And then in terms of where the interviews were
9 carried out.

10 A. The interviews were carried out in 14
11 different locations in these six areas. In some of the
12 cases -- about half of the cases that people were
13 interviewed in shopping centers; and in the other cases
14 they were interviewed in various public places in which
15 the interviewers could intercept people and show them
16 the box and administer the questionnaire to them.

17 Q. I assume you didn't personally conduct all
18 these interviews; right?

19 A. No. There was a field service called
20 "Conscious Marketing," and they did the interviewing
21 and they had a lot of interviewers.

22 Q. I'm sorry. You were describing the field
23 service and their work?

24 A. Auri Beltran is the person who runs Conscious
25 Marketing, and she has this team of interviewers. She

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1 A. Yes. It's essentially the same survey,
2 although there were some minor changes that were made
3 giving the field situation when Advanced Research, who
4 was managing the survey, got the survey. There were
5 certain adjustments made to the survey.

6 Q. Was the wording of the questions changed?

7 A. No, the wording of the questions wasn't
8 changed. Just as an example, I originally -- if you
9 notice, right in the center it says "Version 1." I
10 originally envisioned that there would be a Version 1
11 and a Version 2, that they would be exactly the same;
12 one would be yellow and one would be white.

13 They thought it would be better for the
14 interviewer if they only used one version. So,
15 actually, the only thing that was administered was
16 Version 1. And then the interviewer checked off
17 whether the yellow -- half of them were printed in
18 yellow; 200 were printed in yellow and 100 were printed
19 in white. So that identified which package people got.

20 So they made changes like that. And there
21 were some other changes that were made, but none to the
22 questions -- that I know of, anyway.

23 Q. Where was the interviewing in this survey
4 conducted?

25 A. It was conducted in -- well, one thing, just

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1 trained them, and then they -- she actually had two
2 different training sessions for the interviewers. And
3 she deployed them and gave them all instructions,
4 deployed them throughout the island. All the data were
5 collected over a 3-day period.

6 Q. Let me show you Plaintiff's Exhibit 56.

7 (Documents handed to the witness and to
8 the Court.)

9 Can you tell us what Exhibit 56 is?

10 A. 56 is the report that was issued by Advanced
11 Research Center, with Leroy Lopez, the president, who
12 had this prepared under his supervision.

13 Q. What is Advanced Search Center? What was
14 their role in the survey?

15 A. They managed the survey. I think it says here
16 in the second page. It says they performed the coding
17 and tabulation of the questionnaires and the tables,
18 and they were kind of the liaison with Conscious
19 Marketing in terms of fielding this study.

20 Q. Now, these tables have been hand numbered in
21 lower right-hand corner. Can you turn to page 8?

22 A. Yes.

23 Q. I'll let you tell us what this is.

24 A. Okay.

25 (Publishing.)

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1 If you recall, the first question in the
2 survey asked people, "Have you ever seen or purchased a
3 no-calorie sweetener that looks like the one I showed
4 you or don't you know?"

5 And it turned out when people were exposed to
6 the yellow box, they -- this is the SPLEND box -- 87
7 percent said yes, 13 percent said no.

8 So those 26 no people, they weren't asked any
9 other questions. It's only the 174 that were carried
10 forward.

11 Q. Let's first describe the results for the
12 yellow and we'll go back and talk about and the other
13 one, the white.

14 If you will turn to page 10 and tell us what
15 that is?

16 A. Yes. Okay. The second question, which was
17 the issue of whether there was a sole source. On the
18 yellow box version, of 174 people that went forward
19 because they said yes to the first question, 146 said
20 that the yellow box, the SPLEND box, was associated
21 with one brand; 26 said more than one brand; 2 said
22 don't know. The don't know people were eliminated at
23 that point. And you see 26 said they had not seen or
24 purchased one that looks like the one shown, those
25 people had been already eliminated previously.

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1 said SPLEND or 62.5 percent of the entire 200.

2 But if you wanted to just took at it as the
3 percent of people who were just asked the question, you
4 can see SPLEND, 125, and the most prominent name was
5 SAME; 8 people said SAME and 6 people said EQUAL and so
6 on.

7 Q. If you look at the people who saw the white
8 box, the control box, what does that show in terms of
9 the number of people who mentioned SPLEND there?

10 A. Here, if you remember, we are trying to get
11 the guessing rate or the noise factor here. And even
12 though this box, red, white and blue, it doesn't look
13 anything like the SPLEND box, actually 4 people
14 answered SPLEND or 4 percent, which I'm asserting
15 that's the noise, the guessing rate that needs to be
16 subtracted from the 62.5 SPLEND number.

17 So if you net out 62.5 percent minus 4
18 percent, you get 58.5 percent as the net number that
19 identifies SPLEND net of control.

20 Q. So among no-calorie sweetener purchasers in
21 Puerto Rico, 58-and-a-half percent recognized the
22 SPLEND box, recognize it to be only one brand and
23 identify it as only SPLEND?

24 A. Correct.

25 Q. Now, I notice also in the control results for

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1 Q. So when you see that percentage to the right
2 of that number, of the 146 people who said one brand,
3 and then it says 73 percent, what does the 73 percent
4 represent?

5 A. Well, if you look at the bottom, it shows it's
6 of the 200 in the entire sample.

7 Q. So this is saying roughly three-quarters of
8 these people who qualified for the survey because they
9 are no-calorie sweetener purchasers in the Puerto Rico,
10 recognize the SPLEND trade dress as being only being
11 one brand of no-calorie sweetener?

12 A. Yes.

13 Q. Let's go on to Question 3, which would be
14 asked of those people who said only one brand, those
15 146 people or the 73 percent. I believe that's page 12
16 at the lower right-hand corner.

17 Can you tell us what page 12 reflects?

18 A. Page 12 is the Question 3 that asks people
19 once they indicated -- this is for the single source
20 people -- once they indicated that there was only one
21 brand mentioned, they were asked, "What do you think is
22 the brand name of the no-calorie sweetener that I
23 showed you?"

24 And the vast majority of these people who were
25 asked the question said SPLEND. In other words, 125

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1 the white box, there were 24 people who said EQUAL?

2 A. Yes.

3 Q. Let me show you what's already in evidence as
4 Plaintiff's Exhibit 4.

5 (Box handed to the witness.)

6 First of all, were you surprised by that
7 result of 24?

8 A. Yes, even though it's not an extraordinarily
9 high number, still, yes, I was surprised; because when
10 we picked the control, we didn't think it looked
11 anything like the EQUAL box. But, obviously, 24
12 percent of consumers did associate SPLEND, did
13 identify SPLEND as the -- I mean EQUAL as the one
14 brand. And their answers indicate it was mostly
15 because of the red, white, and blue.

16 Q. So there are the colors that are showing on
17 the screen, the EQUAL versus the control colors in
18 common.

19 Are there any other common elements between
20 the EQUAL and the control trade dress?

21 A. There is the strawberry. EQUAL has a big
22 strawberry. The old Internet SPLEND box has 3
23 strawberries. There are packets on there that are
24 blue; it's a different color blue, but there are
25 packets.

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1 I can see why 24 percent said that. Again,
2 compared to the number that identified SPLEND in the
3 SPLEND box, 62-and-a-half percent, it's obviously much
4 lower than that. But about a quarter of the people did
5 wind up noting that EQUAL was the single source brand
6 they identified.

7 Q. Does that detract from the conclusion, in your
8 opinion, that net of the control about 58-and-a-half
9 percent of these no-calorie sweetener purchasers in
10 Puerto Rico identified the SPLEND trade dress only
11 with SPLEND?

12 A. No, because the idea here is that you want to
13 get a package that doesn't look like the SPLEND
14 package, and you want to see how many people are going
15 to guess SPLEND. And that's the noise control.

16 Q. Finally, with respect to your survey, would
17 you go to page 14 of the report and explain what that
18 is?

19 A. On page 14 people in 3B were asked, "Why do
20 you think that?" And if you look at the yellow box
21 mentions, it shows that the predominant answer was the
22 color of the box.

23 Q. It's 110 in the first line?

24 A. Right, it's the 110. And all the others held
25 by comparison: pictures on the box was the next

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1 A. Let me think now. It was Wednesday morning.

2 Q. And when you arrived on Wednesday morning did
3 you learn that the defendant Merisant also had a survey
4 that it had turned over the previous evening?

5 A. Yes.

6 Q. Since Wednesday morning have you had some time
7 to review and analyze Merisant's survey?

8 A. I can't say I've had a lot of time, but I have
9 looked at it and have some observations about it.

10 Q. Okay. Was that a secondary meaning survey or
11 some other kind of survey?

12 A. No, it was a confusion survey.

13 Q. So designed to determine the level of
14 confusion between SPLEND and SAME?

15 A. Yes.

16 Q. Let me show you first Defendant's Exhibit NN,
17 which I think you have a copy of it in front of you?

18 A. Yes, I do.

19 Q. Can you tell us what this is and also tell us
20 generally had the defendant's survey was done?

21 A. Okay. Well, actually, there were a lot of
22 similarities in terms of people were screened. And the
23 first -- right on the first page are the screening
24 questions.

25 He screened -- Mr. Johnson screened pretty

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1 highest, 32 people said that; the design, 22 people
2 said that; 17 said letters, color of letters; 20 people
3 said "that is the brand I use/buy."

4 But clearly color was the dominant response.

5 MR. ZALESIN: Could I have Exhibit 7, please?

6 (Documents handed to the witness and to
7 the Court.)

8 Q. Is Exhibit 73 a slide that you prepared?

9 A. Yes.

10 Q. And these are your collusions from the survey
11 you just described?

12 A. Yes.

13 Q. Would you summarize them for us?

14 A. Yes. Conclusion 1, the SPLEND trade dress is
15 recognized by a high percentage: 87 percent of
16 purchase of no-calorie sweeteners in Puerto Rico.

17 2, a high percentage of category purchasers
18 associate the SPLEND trade dress with only one brand
19 of no-calorie sweeteners: 73 percent.

20 And 3rd, a substantial majority, 58.5 percent
21 net of noise or net of the control, identify SPLEND as
22 the single brand or source associated with the SPLEND
23 trade dress.

24 Q. Now, Professor Mazis, when did you arrive in
25 Puerto Rico for this experience?

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1 much the way I did. In the middle there, Roman numeral
2 4A, he said, "during the past 3 months have you
3 purchased a sugar substitute product, either for
4 yourself or someone else in your household?"

5 And then B, "Looking ahead in the coming 3
6 months, do you plan to purchase sugar substitutes
7 again?"

8 That is virtuously the same question that I
9 asked in the screener.

10 Going down, "Have you participated in any
11 market research survey in the past 3 months?" He was
12 trying to eliminate professional responders.

13 And then Question 6, VI, "Does any member of
14 you family work for a marketing research firm," and so
15 on.

16 Again, similar question to the one I asked.

17 So the screening in terms of his objective
18 here was to screen people so that we had regular no-
19 calorie sweetener purchasers.

20 Q. It's the same that you did?

21 A. Yes, this is fine.

22 Q. This was carried out in Puerto Rico like your
23 survey?

24 A. Yes.

25 Q. Where in Puerto Rico were these interviews

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1 conducted?

2 A. My understanding it was in 3 shopping centers
3 in the San Juan area.

4 Q. Only the San Juan and not island-wide like
5 your survey?

6 A. Correct.

7 Q. Do you see any advantage to doing it one way
8 or the other?

9 A. Well, I think geographic diversity, if one can
10 obtain it, it's useful. It gives you a more
11 representative sample.

12 Q. Will you explain the basic design of Mr.
13 Johnson's survey, what respondents were shown?

14 A. I've got the two exhibits here.

15 Q. So they were shown either the yellow SAME box
16 -- there should be an exhibit sticker. I think it's on
17 the side panel.

18 A. Right. This is Plaintiff Exhibit 2. They
19 were neither shown -- half of the people were shown the
20 SAME package, and half of the people were shown the
21 SUGAR twin package.

22 Q. Plaintiff Exhibit 30?

23 A. Plaintiff Exhibit 30, which Mr. Johnson claims
24 that the SUGAR TWIN product is the control product in
25 this study.

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1 getting confused myself on this thing.

2 The first question is what we call a "filter
3 question." The filter question is asked then, "Do who
4 know who or what company puts out this product?"

5 And even though they have just seen the
6 product, only 12 percent of the people exposed to SAME
7 said they knew who or what company makes or puts out
8 this product. It was 15.8 percent for SUGAR TWIN,
9 which is saying 88 percent of the people had no idea
10 who or what company puts or makes out the product they
11 had just seen about 30 seconds ago.

12 Q. Or what brand?

13 A. Or what brand, yes.

14 Q. That's one of the things that's asked about?

15 A. Yes, who or what company or brand or company
16 makes. Is they had just seen it, and 88 percent of the
17 people had no idea what the brand is.

18 Q. Let's talk about Question 1B. What happens
19 there?

20 A. At that point there aren't very many people
21 left in the survey for this question, because there was
22 only about 12 percent of the people, if you remember,
23 who said, yes. And it says, "Who or what brand or
24 company do you believe makes or puts out the sugar
25 substitute that I showed you?"

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1 Q. When you say they were shown, similar to your
2 survey, they were given the package and given the
3 chance to look at it as if they were considering it for
4 purchase and then he takes it away?

5 A. Right, same thing. And the same as my study.
6 Each group only gets one package.

7 Q. Let's just go through his questions quickly.
8 We have retyped them here with the data just to make it
9 more accessible. Can you explain what he does in
10 Question 1A?

11 A. The first question says, "Based on what you
12 just saw, do you or don't you know who or what brand or
13 company makes or puts out the sugar substitute that I
14 showed you?"

15 Q. And then the data reflected underneath for the
16 people who saw the SAME box and the people who saw the
17 SUGAR TWIN box, what do you see there?

18 A. You have to remember at this point, the person
19 was just shown the box, and then it was taken away from
20 the person. So the people were then asked "what
21 company makes or puts out the sugar substitute that I
22 showed you?"

23 Only 12 percent of the people identified that
24 product that they had just seen, with SAME, where they
25 identified that company as the -- no, I'm sorry. I'm

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1 Of the people left, 4.1 of the same group said
2 SPLENDIA; and the SUGAR TWIN group it was 2.2 percent
3 answered SPLENDIA. And you can see the other answers
4 there: SAME is 2.4, and 2.4 in the SUGAR TWIN cell.

5 Q. Let me understand. There are shown a box of
6 SAME and are given as much time as they want to examine
7 and, and that box is the actual SAME box with the brand
8 name on it?

9 A. Yes, it doesn't have anything deleted.

10 Q. So they look at the box and takes it away, and
11 a few seconds later only 3 and-a-half percent, roughly,
12 of the people can say what brand it is?

13 A. That's right.

14 Q. Let's go on to Question 2A and tell us what's
15 happening there.

16 A. 2A asks -- now all the people get asked 2A.
17 So if they got filtered out on 1A, they still got back
18 into the survey again. And that's fine. There is
19 nothing wrong the that.

20 "Do you believe that whoever makes or puts out
21 the sugar substitute I showed you is or is not related
22 to, sponsored by, or associated with any other brands
23 or manufacturer?"

24 41 percent of the people said they did believe
25 that there was some relationship or sponsorship or

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1 association with some other brands or manufacturers; 41
2 percent, almost half of the same group people exposed
3 to the SAME box said yes; and 45.9 percent of the
4 people who were exposed to SUGAR TWIN, they said yes to
5 that question.

6 Q. And the rest said no or no opinion?

7 A. Right. So a little more than --- between 50
8 and 60 percent said no or no opinion.

9 Q. For those who said yes, they are asked
10 Question 2B?

11 A. Yes, that's the follow up question: "If yes,
12 who would that be?" Then follow up on any others.

13 In the SAME group it was 22 percent of the
14 same people exposed to SAME said that SPLENDIA was the
15 company that was -- or brand that was related to or
16 associated and so on.

17 In the SUGAR TWIN group it was 19.2 percent.
18 Mr. Johnson considers that to be the control. And so
19 he nets out the difference between the control group,
20 the test group, which is the SAME group, and what he
21 calls the "control group," the SUGAR TWIN; and the
22 difference between 22.0 and 19.8 is 2.8 -- according to
23 higher math here -- 2.8 percent difference. So Mr.
24 Johnson concludes there must not be confusion here
25 because 2.8 percent is a pretty low confusion number.

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1 made famous in the Union Carbide case involving sort of
2 an Ever Ready knock off.

3 Q. You're familiar with a reference called
4 "McCarthy on Trademarks"?

5 A. Yes.

6 Q. It's one that both sides have cited in this
7 case. I'm showing you an excerpt from McCarthy on
8 Trademarks, Section 32.074, and he says, "Now standard
9 survey format used to proved likely confusion in cases
10 where plaintiff makes some products which defendant
11 does not is the Ever Ready format."

12 That's the Union Carbide against Ever Ready
13 case you were talking about?

14 A. Yes.

15 Q. He goes through here what the Ever Ready
16 format is. Let's see how Mr. McCarthy describes it.

17 By the way, have you had an opportunity to
18 review the actual case, the Ever Ready case?

19 A. I perused it, but I can't say I've studied the
20 whole thing.

21 Q. Okay. Let's see how Mr. McCarthy describes an
22 Ever Ready survey. First he starts with -- No. 1
23 starts the screening questions?

24 A. Right.

25 Q. And on the next page there are some additional

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1 Q. Does he also look at the net confusion based
2 on the two questions, 1B and 2B?

3 A. Right. So he goes further and accumulates it,
4 which is the proper thing to do.

5 So looking at then taking the answers from 1B
6 and 2B, the SPLENDIA number was 24.9; and for SUGAR TWIN
7 the SPLENDIA mentioned was 20.6; and the difference
8 between the two is 4.3 percent. And that was Mr.
9 Johnson's confusion rate, that he based it on that
10 calculation.

11 Q. Okay.

12 A. And he concludes that's a low confusion number
13 and there isn't much confusion here produced by the
14 SAME package.

15 Q. Now, I know you have a number of thoughts
16 about this survey, and we are going to go through them.

17 First of all, are you familiar with survey
18 research that uses this basic design to show people the
19 product, take it away, and then you ask them a series
20 of these questions?

21 A. Yes. Standard procedure in survey research.

22 Q. Is there a name that's given to this
23 particular kind of survey design in a trademark case?

24 A. In the confusion area, sort of the prototype
25 that's talked about is the Ever Ready design, I guess

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1 questions, 2, 3, and 4. Will you read those?

2 A. This Every Ready procedure is very simple. I
3 mean, I will say, having conducted surveys for over 30
4 years, you have to make surveys simple so consumers can
5 understand them. And this a very simple,
6 understandable procedure. "Who do you think puts out
7 the lamp shown here?"

8 Q. That case was about lamps, Ever Ready?

9 A. Yes.

10 Q. So, "Who do you think puts out the lamp shown
11 here?" That's Question 2. And Question 3 is what?

12 A. "What makes you think so?"

13 Q. And Question 4?

14 A. "Please name any other products put out by the
15 same concern which puts out the lamps shown here."

16 Q. And that's the whole survey.

17 A. Yes.

18 Q. Now, let's compare the survey that was done in
19 the Every Ready case and described in McCarthy to what
20 Mr. Johnson actually did.

21 A. Okay. If Mr. Johnson had used the Ever Ready
22 format -- and I'm not maintaining here that this is the
23 only format that one can use. Obviously, there are
24 different ways to ask questions. But this provides
25 sort of a good exemplar in comparing his questions to

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1 the standard here.

2 When you look at the Ever Ready method, if he
3 would have used that, it would be 'Who do you think
4 puts out the sugar substitute shown here?'

5 Mr. Johnson uses a two-part question. And I
6 will say, having been involved in some of these cases,
7 if you wanted to design a question that would not show
8 confusion, this would be a good method. And the reason
9 is the questioning is so convoluted.

10 If you read the question, honestly, I had to
11 read the thing over a couple of times to try to
12 understand it. It says, "Based on what you just saw,
13 do you or don't you know who or what brand or company
14 makes or puts out the sugar substitute that I showed
15 you?"

16 I counted four "or's" in that question. I was
17 kind of thinking about rowing: or, or, or, or. It
18 just keeps going with all these or's. It's very
19 confusing.

20 And most people said no. They didn't pass
21 through this question. Only 12 percent of the people
22 actually answered affirmatively, which isn't to say
23 that everyone has an opinion on this.

24 Q. But these are people who just looked at the
25 box; right?

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1 you. "What makes you say that?" For example, you
2 would put in SAME or, Merisant.

3 "What makes you say that SAME makes or puts
4 out the sugar substitute that I showed you?" And they
5 give an answer such as the package color or something
6 like that.

7 Q. And then Mr. Johnson's Question 2, I guess,
8 2A, B, C, are on the right and the Ever Ready is on the
9 left. Can you talk about that?

10 A. Yes. The Ever Ready question is just very,
11 very simple. "Please name any other products put out
12 by the same concern which puts out the sugar substitute
13 shown here."

14 Obviously, they didn't use sugar substitute,
15 but I'm filling that in, because that's the way you
16 would phrase it.

17 Mr. Johnson's question was: "Do you believe
18 that whoever makes or puts out the sugar substitute I
19 showed you, is or is not related to or sponsored by or
20 associated with any other brands or manufacturer?"

21 Again, I found four "or's" in there. It's
22 just not a user friendly kind of question. And, again,
23 "If yes, who would that be?" Any others; which is
24 fine.

25 What else makes you say that? What else?

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1 A. Right, they just looked at. And to say after
2 you just looked at it, "Do you know what brand or
3 company makes or puts out this product?" I mean, come
4 on; you just saw the thing.

5 They might not know it's Merisant, for
6 example, and a lot of people wouldn't. But certainly
7 the brand is SAME. Why wouldn't they say that?

8 And then it says, "If yes, who or what brand
9 or company do you believe makes or puts out the sugar
10 substitute that I showed?"

11 There is nothing wrong with that question. It
12 wasn't asked of very many people.

13 Q. So he has filtered out 88 percent of the
14 people with that Question 1?

15 A. Right. If he wanted to design something to
16 push down, to suppress the confusion rate, this would
17 be a good approach, because it's just not a very
18 understandable sequence to people.

19 Q. Let's go on. What happens as the survey
20 progresses? Again, we have the Ever Ready design on
21 the left, and Mr. Johnson's design on the right.

22 A. Then, "What makes you think so?" That's the
23 Every Ready.

24 Mr. Johnson's question is fine. "What makes
25 you say that?" And you fill in the answer they gave

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1 Those are fine.

2 Q. So we are clear, those two questions that you
3 talked about with the four or's, Questions 1A and 2A.
4 Question 1A, Mr. Johnson lost, what, 88 percent of the
5 respondents?

6 A. Yes.

7 Q. And Question 2A, he lost about 57 percent?

8 A. Yes.

9 Q. Now, I'm also going to show you an excerpt
10 from Mr. Johnson's declaration in this case.

11 You said that in your survey you used that red
12 and white SPLENDAX box, the so-called control stimulus
13 to filter out noise. Do you recall that?

14 A. Yes.

15 Q. What is noise again?

16 A. Noise is external factors. You think of this
17 as sometimes -- I think the term came up from
18 electrical circuits, that somehow there is noise that
19 interferes with the circuit, disrupts it, an outside
20 factor. And in survey research it means that you can't
21 rely on the conclusions because there could be some
22 outside factor that could have caused the result that
23 you observed.

24 So the types of issues that are usually
25 thought about in outside factors are either people

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1 guess the answer. In other words, because SPLENDIA is a
2 well known brand, they just guess SPLENDIA. Or it could
3 be produced by biases in the question wording. If you
4 worded the question in a particular way that biased
5 people, your result may be due not so much to what you
6 found but may be due to the biasing nature of the
7 question.

8 So usually guessing or sometimes called
9 "pre-existing knowledge" and question wording are
10 usually the two items that interfere with your being
11 about to make a definitive statement about a certain
12 study.

13 Q. And the purpose of the control is to assess
14 the level of that kind of noise so you can subtract it
15 out?

16 A. Yes, as best you can. It's not a perfect
17 process, but in these studies you try to come up with
18 some stimulus that's relatively neutral that doesn't
19 share in the characteristics of the origin product to
20 try to assess how many people, for example, would say
21 SPLENDIA.

22 Q. No matter what you showed them.

23 A. No matter what you showed them. It's
24 basically a guessing rate.

25 Q. So in Mr. Johnson's declaration he has some

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1 such products are used or may appear."

2 Is that consistent with the definition of
3 noise as you have always used it in your career?

4 A. No. I've been doing this research for over 30
5 years. I've never seen anybody define noise that way
6 or even close to that.

7 Q. So is it appropriate in a survey to use a
8 control to so-called filter out that kind of noise, the
9 noise I have highlighted in blue from Mr. Johnson's
10 declaration?

11 A. No, it's not noise.

12 Q. What is it?

13 A. Well, it's another factor that you might want
14 to study, but it isn't noise. It's not guessing or
15 question wording. It's totally something else. It's
16 just not relevant.

17 Q. So let's understand. Mr. Johnson showed half
18 of his respondents the SAME package. That's the one
19 that is at issue in this case; right?

20 A. Right.

21 Q. And the other half he showed the SUGAR TWIN
22 package?

23 A. Yes.

24 Q. He subtracted from the people who mentioned
25 SPLENDIA when they saw the SAME package the number of

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1 discussion of noise. Let me start first with paragraph
2 8 of his declaration. He says, "It is also the
3 generally accepted practice to include such a control
4 group to account for whatever proportion of the
5 relevant universe might guess or plausibly name a
6 product brand or manufacturer as a source simply
7 because it is a popular product in the same genre of
8 products."

9 Is that essentially what you just said?

10 A. Well, it's certainly a big source of noise.
11 As I said, the other issue has to do with question
12 wording. You get a bias in the question. He doesn't
13 mention that.

14 Q. This is one type of noise?

15 A. Yes.

16 Q. Let's look at the preceding paragraph,
17 paragraph 7. He says in that paragraph, "Such a
18 control is essential to measure the general noise level
19 caused by popularity or market share."

20 Do you have any disagreement with that?

21 A. No.

22 Q. Then he goes on to say, "Such a control is
23 necessary to measure as well as similarities in the
24 common attributes of packaging, like colors which are
25 used on products, as well as graphics which show how

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1 people who mentioned SPLENDIA when they saw the SUGAR
2 TWIN package.

3 A. Yes.

4 Q. So he treated all of the people who mentioned
5 SPLENDIA when exposed to SUGAR TWIN as "noise."

6 A. That's his theory.

7 Q. When you're doing one of these studies it is
8 important to choose an appropriate control as an
9 important research element?

10 A. I believe so.

11 Q. Why?

12 A. Well, I mean, there are two reasons. One is
13 you don't know whether people are just guessing the
14 answer; and the second reason is if you have some bias
15 questions, the bias questions may be causing the
16 results. So you don't really know.

17 The idea is to eliminate guessing and bias
18 questions as a possible reason for the answers you got.

19 Q. So you definitely want to have a control. Is
20 what you're saying?

21 A. In just about all cases it's appropriate to
22 have a control.

23 Q. How do you go about choosing a control? How
24 do you decide what is an appropriate control?

25 A. Well, I guess I would say it's sort of more

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1 art than science really. I mean, certainly different
2 people could come up with different controls that they
3 might use. But the essential notion of the control in
4 this case is we have a SAME package that's yellow and
5 has blue writing on it, and we have the SUGAR TWIN
6 package that's yellow. And so you've got an overlap of
7 yellow in these two products. So when you compare SAME
8 to SUGAR TWIN you're not getting the guessing rate
9 because the results could be due to guessing, but they
10 could be due to the similarity in the packages. That
11 could be producing your result.

12 The idea here is you want to take the SAME
13 responses and you want to adjust them in some way,
14 because people may be guessing SPLENDIA, as an example.
15 Or maybe you questions have bias them so that they say
16 SPLENDIA.

17 You want to use some neutral stimulus so that
18 you get the distinct that the SPLENDIA mentions and it's
19 solely based on this guessing rate.

20 And this doesn't do that, because we don't
21 know what produced the responses to the SUGAR TWIN. it
22 may have been guessing, and probably likely it's just
23 yellow.

24 I've never seen this as a control. I've been
25 doing this as a long time. It's not a noise control.

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1 questions?

2 This is a section that deals with the issue of
3 control of the noise that we have been discussing?

4 A. Yes. It goes on for three or four pages, I
5 think. But that's an important section in discussing
6 appropriate controls.

7 Q. So let's just go through a couple of excerpts
8 from this. You talked about the kind of noise that
9 would be causing by people guessing, say, SPLENDIA just
10 because it's a very popular brand name.

11 Is that referred to here by Professor Diamond?

12 A. Yes. She gives us example of a secondary
13 meaning survey. It's right above the highlighted
14 portion. It says, "In a trademark survey attempting to
15 show secondary meaning, for example, respondents were
16 shown a picture of the stripes on MENNEN stick
17 deodorant, the trade dress, and asked "Which brand
18 would you say uses these stripes on the package?"

19 The Court recognized that the high percentage
20 of respondents selecting MENNEN from an array of brand
21 names may have represented "merely a playback of brand
22 share." That is, respondents asked to give a brand
23 name may guess the one that is most familiar, generally
24 the brand with the largest market share.

25 Q. So that's the phenomenon you were talking

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1 Q. Let's me show you Plaintiff's Exhibit 74.

2 (Documents handed to the witness and to
3 the Court.)

4 What is Exhibit 74?

5 A. It's the reference guide on survey research
6 put out by the Federal Judicial Center. It's a very
7 authoritative source that is referred to very often in
8 these survey cases.

9 Q. So if we look at the top of page 2, the second
10 page of the document, this comes out of the reference
11 manual on scientific evidence?

12 A. Yes, it does.

13 Q. The author, Shari Diamond, do you know her?

14 A. Not personally. I know of her.

15 Q. Are you familiar with this particular
16 reference?

17 A. Oh, yes. I've used it many times in these
18 survey cases.

19 Q. This is well respected by experts such as
20 yourself?

21 A. Yes.

22 Q. Let me direct your attention to page 256 of
23 this document. There is a section here, section F. If
24 the survey was designed to test a causal proposition,
25 did the survey include an appropriate control group of

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1 about. You don't want people just saying SPLENDIA
2 because SPLENDIA IS the market leader in Puerto Rico.

3 A. Right.

4 Q. And you want a control for that; is that
5 correct?

6 A. Yes.

7 Q. Let's go on. It talks about the purpose of
8 the control group and what happens if you don't have
9 one. Will you comment on page 257?

10 A. Yes. On the highlight, of course, she gives
11 us an example. Toward the end of it she says, "Without
12 the control group it is not possible to determine how
13 much of the 40 percent that is due to respondents
14 pre-existing beliefs or other background noise such as
15 respondents misunderstanding the question or misstate
16 their responses.

17 When she is talking about pre-existing beliefs
18 here, this is really the guessing phenomenon here that
19 based on your knowledge that MENNEN is the market
20 leader and you have that belief when and supply that
21 information.

22 So she says then, "Both pre-existing beliefs,
23 such as your knowledge of SPLENDIA or MENNEN, and other
24 background noise should have produced similar response
25 levels in the experimental and control groups.

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1 Q. And is that consistent with the kind of noise
2 that you have been talking about?

3 A. Yes.

4 Q. Does she anywhere in this article talk about
5 the kind of noise that Mr. Johnson refers to in the
6 second half of that sentence I showed you in paragraph
7 7 of his declaration, similarities and common
8 attributes of packaging like colors, et cetera? Does
9 she ever refer to that as noise?

10 A. No, nothing like that.

11 Q. Finally, with respect to Professor Diamond in
12 the reference manual on survey and scientific evidence,
13 I highlighted a section also on page 258. Can you
14 comment on that?

15 A. Here she says "If, for example, the control
16 stimulus in a case of alleged trademark infringement is
17 in itself a likely source of consumer confusion,
18 reactions to the experimental or control stimuli may
19 not differ, because both cause respondents to express
20 the same level of confusion.

21 Q. Does that have any application in this case of
22 trademark or trade dress infringement?

23 A. I believe it does because, as we mentioned,
24 SUGAR TWIN is yellow, and to the extent that people
25 misidentify the maker or the brand and identify it as

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1 question.

2 It's just the first question so few people got
3 asked the key question that the numbers are lot lower
4 than they probably should be. You have to do another
5 study the right questions to know what the real number
6 really should be.

7 Q. Just one other question, Mr. Locascio
8 suggested in his opening statement yesterday that
9 obviously what must have happened here is that McNeil
10 must have conducted its on confusion study, got bad
11 results and then ditched it.

12 Did you have anything to do with any survey
13 other than the secondary meaning survey that you
14 conducted?

15 A. No, I didn't.

16 MR. ZALESIN: No further questions. Thank
17 you.

18 THE COURT: I think I'll have a recess now.
19 (After break.)

20 THE COURT: I remind the witness he is under
21 oath.

22 MR. LOCASCIO: May I proceed, Your Honor?

23 THE COURT: Yes.

24 CROSS-EXAMINATION

25 BY MR. LOCASCIO:

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1 SPLENDIA, that may be due to the overlap because it's
2 yellow. It's likely there is some confusion with SUGAR
3 TWIN. We don't know how much because -- well, all we
4 know is that it's not a good control.

5 Q. Do you accept Mr. Johnson's conclusion that
6 only about 4 percent of consumers mistakenly associate
7 the SAME trade dress at issue in this case with
8 SPLENDIA?

9 A. Not based on what I've seen here. A, he
10 doesn't have an appropriate control, so we don't have
11 any kind of noise adjustment here; and, secondly, there
12 is likely some understatement. How much, I don't know.
13 Because hardly any of those 24.9 percent SAME people
14 were -- well, none of that came from that first
15 question. And so it only came from the second
16 question. So if the first question were asked properly
17 in the Every Ready format, you might have gotten a
18 higher number.

19 Q. So you think he may have gotten more than 25
20 percent if he had asked proper questions?

21 A. I think it's likely, but I can't prove that.
22 I think the questions basically suppress the number of
23 people who could be asked the question; and, therefore,
24 if more people were asked the question, probably more
25 would have said SPLENDIA in response to that first

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1 Q. Dr. Mazis, you were in the courtroom all day
2 yesterday; right?

3 A. Yes.

4 Q. So you saw opening statements, you saw Ms.
5 Sandler testify and the other witness. Is that right?

6 A. Yes.

7 Q. And you understand that this is a case about
8 the trade dress of the SPLENDIA package, in particular
9 this package; correct?

10 A. Yes.

11 Q. This is not a case about the trademark in the
12 color yellow. It's an overall trade dress case;
13 correct?

14 A. Right.

15 Q. So you understand it's the overall impression
16 of the package right?

17 A. Yes.

18 Q. And you remember there was some discussion
19 during opening statements that my client Merisant
20 believed that perhaps McNeil had not specifically
21 identified what they were asserting was the trade dress
22 in this case.

23 And Mr. Zalesin said, "Yes, we have; it's in
24 our papers."

25 Do you remember that?

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- 1 A. Not really.
- 2 Q. Let me ask you this question: Fair to say the
- 3 biggest difference between your view of your survey and
- 4 your view of Mr. Johnson's survey is whether the
- 5 control should be yellow. Is that fair?
- 6 A. Could you repeat that?
- 7 Q. Sure. Your control in your survey is white;
- 8 correct?
- 9 A. Yes.
- 10 Q. And Mr. Johnson used a control the SUGAR TWIN
- 11 box, which has a yellow color on it; correct?
- 12 A. Yes.
- 13 Q. And you believe you believe that the use of
- 14 the yellow box by Mr. Johnson was inappropriate. Fair?
- 15 A. Yes.
- 16 Q. And you think that lead to a lot of the data
- 17 here that you think is misleading about Mr. Johnson's
- 18 survey. Is that right?
- 19 A. That's part of it. That is an issue.
- 20 Q. Let me show you what McNeil is contending is
- 21 the trade dress at issue in this case.
- 22 They listed specific elements. Have you seen
- 23 this sort of thing before in a trade dress case? These
- 24 are the elements we are seeking to protect.
- 25 A. Yes.

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- 1 A. Yes.
- 2 Q. And McNeil is not saying any brand name in
- 3 blue. They are saying it has to gradually dim from
- 4 lighter to darker; correct?
- 5 A. Yes.
- 6 Q. The next one says "a white cloud surrounding
- 7 the brand name." That's the third component of the
- 8 trade dress issue in this case.
- 9 Does the SUGAR TWIN box have a white cloud
- 10 surrounding the brand name?
- 11 A. No.
- 12 Q. The fourth element being protected in this
- 13 case, "a full coffee cup and saucer in the foreground
- 14 on the right side of the package's front panel."
- 15 Dr. Mazis, the SUGAR TWIN box doesn't have a
- 16 coffee cup with a saucer on the right side in the
- 17 foreground, does it?
- 18 A. No.
- 19 Q. The fifth element. "The sweetener package
- 20 resting on the saucer in the foreground."
- 21 Again, the SUGAR TWIN box does not have the
- 22 sweetener package resting on the saucer on the
- 23 foreground, does it?
- 24 It doesn't even have a saucer, so that seems
- 25 like an easy one.

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- 1 Q. You're familiar with that.
- 2 A. Yes.
- 3 Q. That's something that should and has to be
- 4 done to know what's being protected.
- 5 A. I suppose so. I'm not an attorney. It sounds
- 6 right.
- 7 Q. This first thing in the brief -- and this is
- 8 their list of what they are protecting -- is a
- 9 distinctive pastel yellow background; correct?
- 10 A. Yes.
- 11 Q. You saw Ms. Sandler testify that the color on
- 12 SUGAR TWIN and DOMINO was a neon yellow and not a
- 13 pastel yellow; correct?
- 14 A. Yes.
- 15 Q. And the second thing they are protecting is a
- 16 brand name lettering that gradually dims from lighter
- 17 to darker blue. That's the second element. Do you see
- 18 that?
- 19 A. Yes.
- 20 Q. The SPLENDA box has that sort of lettering.
- 21 It's light at the top and dark at the bottom; correct?
- 22 A. Yes.
- 23 Q. The SUGAR TWIN box, the lettering is not
- 24 gradually dimming from lighter to dark. It's solid
- 25 blue; correct?

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- 1 A. Right.
- 2 Q. The sixth element. "Yellow coloring and blue
- 3 letter on the sweetener packets."
- 4 The SUGAR TWIN box has one packet and it has
- 5 blue letters on yellow; correct?
- 6 A. Yes.
- 7 Q. So that's the only one so far that's even
- 8 close to what McNeil has listed here; right?
- 9 A. Okay.
- 10 Q. The seventh element. "A glass with a cold
- 11 beverage in the foreground on the left side of the
- 12 package's front panel and the presence of fruit on the
- 13 left side of the package's front panel."
- 14 Dr. Mazis, the SUGAR TWIN box does not have a
- 15 cold beverage in the foreground on the left side and
- 16 the presence of fruit on the left side of the package's
- 17 front panel, does it?
- 18 A. I'm sorry. Which one were you reading to me?
- 19 Q. The seventh element of McNeil's trade dress
- 20 issue in this case is not present in the SUGAR TWIN
- 21 box; correct?
- 22 A. Holds a glass with a cold beverage in the
- 23 foreground, left side of the front panel, presence of
- 24 fruit.
- 25 No, it just has the cold beverage and the

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1 fruit.

2 Q. And it's indeed actually behind the cup of

3 coffee. So it's not in the foreground; right?

4 A. Right.

5 Q. The eighth element being asserted as the trade

6 dress trade in this case is an informational banner in

7 the lower-left corner of the front panel with a

8 reference to sugar.

9 The lower-left corner of the SUGAR TWIN box

10 has no mention, much less a reference to sugar on the

11 banner; right?

12 A. Right.

13 Q. The ninth element and the last thing of this

14 being the trade dress side at issue in this case is the

15 dimensions and orientation of the package. That's this

16 package, the SPLEND box; correct?

17 A. Correct.

18 Q. The SUGAR TWIN box does not share the

19 dimensions and orientation of that package, does it?

20 A. It doesn't share dimensions, but I think it

21 shares the orientation, doesn't it? Isn't it

22 horizontal?

23 Q. So one half of that element, being a box

24 that's on a landscape or horizontal arrangement. But

25 it's not the size or dimensions of this box.

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1 That's what you're testing -- right? -- in

2 this case the SPLEND box.

3 A. Right.

4 Q. And for Mr. Johnson's survey, the SAME box.

5 A. Right.

6 Q. As possible, with one exception, you should

7 exclude the characteristic whose influence is being

8 assessed. And in this case that's the trade dress at

9 issue, the list of things we just went through; right?

10 A. Right.

11 Q. So the Federal Judiciary Center's book, which

12 you were talking about a minute is well respected --

13 it's Ms. Diamond's commentary -- makes clear the

14 control used in the study should share as much as

15 possible with the box being tested but exclude the

16 specific elements being asserted by the plaintiff a the

17 trade dress. Right?

18 A. Yes.

19 Q. And SUGAR TWIN box, you said, shares a lot of

20 things with the SPLEND box, and maybe that's why

21 people associate it and perhaps it's a color yellow;

22 it's a particular shade of yellow; or it's got a glass

23 of iced tea on it.

24 But it does not share the same characteristics

25 being asserted in this case, the list we just went

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1 A. The size is a little different, yes.

2 Q. Mr. Zalesin showed you a few pages from Ms.

3 Diamond's commentary that's the reference guide on

4 survey research; right?

5 A. Yes.

6 Q. That's respected. It's something you have

7 used before.

8 A. Absolutely.

9 Q. Indeed it's in the Federal Judiciary Center's

10 reference manual on scientific evidence; correct?

11 A. Yes.

12 Q. He cited something from the very top of this

13 page up here. That was the carry over sentence.

14 Do you remember that?

15 A. Yes.

16 Q. And then there is something else down below.

17 But let me show you what it says right in the middle.

18 And I'm sure my library staff will appreciate

19 this.

20 (Highlighting in document on the

21 monitor.)

22 It says quite clearly, "In designing a control

23 group study the expert should select a stimulus for the

24 control group that shares as many characteristics with

25 the experimental stimulus."

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1 through from the SPLEND box; right?

2 A. That's right. But it doesn't share the

3 essential characteristic, which is color. That's the

4 essential element here.

5 My survey shows how many people mentioned

6 color. And Mr. Johnson's survey shows color is what is

7 the primary identifier. That's what people are coming

8 up with. That's what they are mentioning.

9 So color is the key characteristic. You can't

10 have color overlap; otherwise, wise it's not a good

11 control.

12 Q. So the value of your survey is based on the

13 fact that the color of a yellow box is associated with

14 SPLEND, any color yellow.

15 A. I never said that.

16 Q. You're asserting that the color is the key

17 part of your survey results; fair?

18 A. I'm talking about in terms of what people are

19 associating. What they're using to make the

20 association is color. Half of the people said that.

21 Do other elements come up? Yes. They

22 mentioned other elements; not that these other elements

23 are irrelevant. They are relevant. But color was the

24 thing they mentioned most often.

25 Q. Dr. Mazis, this case is not about the color

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1 yellow; it's about the trade dress at issue; correct?
 2 A. Yes.
 3 Q. And the trade dress at issue specifically says
 4 "a distinctive pastel yellow background," as well as
 5 the other eight factors we looked at; right?
 6 A. Right.
 7 Q. Do you think this is a distinctive pastel
 8 yellow?
 9 A. It isn't, but it's fairly close. It is
 10 yellow.
 11 Q. Ms. Sandler said that it's neon yellow. Do
 12 you remember that?
 13 A. I don't.
 14 Q. You don't remember when she was on the witness
 15 stand you were over there and she said DOMINO and SUGAR
 16 TWIN were neon yellow; SPLEND, SAME with sugar, pastel
 17 yellow. You don't remember that.
 18 A. I don't remember, but I'll accept that she
 19 said that.
 20 Q. Isn't it true that a non-infringing or product
 21 with a different overall impression is an appropriate
 22 control?
 23 A. Could you repeat that?
 24 Q. Sure. A control that is non-infringing or not
 25 causing confusion is appropriate; right?

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1 carry over. Thank you, Your Honor.
 2
 3 Q. "And although SUGAR TWIN uses yellow and blue
 4 colors in its trade dress, the overall look and feel of
 5 the -- " now, when she signed it the pagination didn't
 6 lay out the same way. It was a printout.
 7 So the overall look and feel -- yet again, the
 8 Court is always right -- of the SUGAR TWIN package is
 9 very different from that of SPLEND.
 10 So McNeil's asserted trade dress in this case
 11 is not all yellow box. It's not even all yellow blue
 12 and white box. It's: Does it have those nine
 13 elements?
 14 Right?
 15 And Ms. Sandler says, "The overall look and
 16 feel, i.e., overall impression of this box is indeed
 17 very different than that of SPLEND."
 18 Right?
 19 A. That's what she asserts.
 20 Q. Well, you're not today on the witness stand
 21 saying that McNeil's position in this case is those
 22 nine elements, but I don't agree with that; I think
 23 they have rights in just a yellow box?
 24 A. No, but Ms. Sandler is not a researcher. She
 25 is marketing vice president. She is a marketing

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1 A. That would be one of the elements.
 2 Q. You want to look for when you're considering
 3 the control if the product is also confusingly similar,
 4 and, thus, infringing. That's not a very good control.
 5 A. Correct. I'll say that's one of the elements.
 6 I agree.
 7 Q. If the product has a different overall look
 8 and feel in the trade dress case, that might be a
 9 better control; fair?
 10 A. Yes, you would want something that looks
 11 substantially different as a control.
 12 Q. Ms. Sandler, in addition to testifying about
 13 the color being different, swore out an affidavit in
 14 this case. She's is McNeil's corporate representative.
 15 And you remember there is issue as to SUGAR
 16 TWIN: Does it have anything to do with this case in
 17 response to McNeil's demands that they had rights in a
 18 box that was yellow?
 19 And Merisant said 'SUGAR TWIN is out there and
 20 so is DOMINO. They were there before you. They used
 21 yellow. What gives?
 22 McNeil and then Ms. Sandler in her declaration
 23 say -- and although SUGAR TWIN says --
 24 THE COURT: I think it's the next page.
 25 MR. LOCASCIO: Now I've got both. It's a

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1 manager.
 2 From a research point of view, there is no way
 3 that you would want to select a control that was
 4 yellow, because you don't know if the responses that
 5 people were giving to the so-called "control" are
 6 really controlling for guessing or is it just because
 7 there is some level of confusion because of the SUGAR
 8 TWIN box.
 9 You can't sort that out. Why not use another
 10 box in a different color? It would be easy.
 11 Q. Indeed if you use one that's different, people
 12 wouldn't connect it as closely to SPLEND.
 13 Your control had strawberries on it, which is
 14 on EQUAL's box; right?
 15 A. Well, if you want --
 16 Q. Dr. Mazis, on redirect you can say what you
 17 want. I'd like you to answer my question I ask it,
 18 please.
 19 A. Could you repeat it?
 20 Q. Sure. Your control had strawberries on it;
 21 correct?
 22 A. Yes.
 23 Q. And EQUAL has strawberries on it; right?
 24 A. Yes.
 25 Q. And did you notice a high correlation between

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1 your control and EQUAL even though it had those three
 2 little strawberries on it?
 3 A. wouldn't say it's a high correlation. Only
 4 24 percent of the people said that.
 5 Q. 24 percent of the people said that.
 6 A. Much less than said SPLEND to the SPLEND
 7 box. But it certainly was higher than I would want to
 8 see.
 9 Q. It wasn't a very good control. You would like
 10 to do it over?
 11 A. No, I didn't say it wasn't a good control. I
 12 thought the control was fine. It's just sometimes in
 13 retrospect you go, 'Well, rather than red, white, and
 14 blue, maybe it should have been green or something.'
 15 Maybe that would have been a little better, but I think
 16 the control worked well.
 17 Q. If there are multiple products in the
 18 marketplace that are yellow and one is the dominant --
 19 has the largest market share -- and people see a yellow
 20 box, they might guess SPLEND, because that's the one
 21 on top of their mind. Right?
 22 A. Correct.
 23 Q. And if they guessing SPLEND because of
 24 yellow -- not because of the overall impression --
 25 that's noise, because they are not making a connection

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1 Correct?
 2 A. Could be, yes.
 3 Q. And those people are guessing; right?
 4 A. Sure.
 5 Q. And guessing is noise; right?
 6 A. Right.
 7 Q. Dr. Mazis, let me back up a step for you.
 8 We'll come back to this control issue.
 9 Your report that you filed in this case was
 10 called "Interim Expert Report."
 11 What does that mean?
 12 A. What it meant was when it was initially filed,
 13 it wasn't complete. And when it was eventually
 14 filed --
 15 Q. You mean sent us. Because it was never filed
 16 with the Court.
 17 A. Right. We forgot to take off the "Interim."
 18 So it was an oversight.
 19 Q. Basically, that meant "draft"?
 20 A. Yes.
 21 Q. And the version that has been turned over and
 22 was introduced here, that's the final version.
 23 A. Yes.
 24 MR. ZALESIN: Objection. Nothing has been
 25 introduced yet.

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1 with the overall package. They are making a connection
 2 to the fact that's in a yellow box. Correct?
 3 A. We don't know why they are doing it. You just
 4 don't know if people when SUGAR TWIN is shown to them
 5 there is two possibilities. One is they could just be
 6 guess SPLEND. There may be the guessing rate. The
 7 other is they may be confused. They may actually
 8 associate or think that SPLEND is somehow conducted
 9 with SUGAR TWIN.
 10 The problem is you don't know which caused
 11 what. So it's not a true noise control, because you
 12 can't isolate what the rate of guessing is.
 13 Q. So they are either looking at this and
 14 guessing. Because it's as if they are guessing in a
 15 room with the lights off. They just yell out a
 16 sweetener no matter what you show them.
 17 That's one type of guessing.
 18 A. I don't think I said that.
 19 Q. Well, there are people who guess no matter
 20 what it looks like -- right? -- because of the
 21 sweetener they know.
 22 A. Certainly there are people that do that.
 23 Q. And then there are people who try to figure
 24 out the answer. They look at it and say, 'Well, I know
 25 another yellow product, so I'll guess SPLEND.'

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1 MR. LOCASCIO: Let's go ahead and look at
 2 that.
 3 BY MR. LOCASCIO:
 4 Q. You're not planning over the next week or two
 5 to supplement your report or any more research, are
 6 you?
 7 A. I hope not.
 8 Q. While we are getting the report out, you
 9 mentioned when you were initially contacted, you were
 10 asked to do a secondary meaning survey; right?
 11 A. Right.
 12 Q. You testified in other cases. You have done
 13 other surveys for people?
 14 A. Yes.
 15 Q. And you have done confusion surveys; right?
 16 A. Yes.
 17 Q. You were never asked to do a likelihood of
 18 confusion survey?
 19 A. No.
 20 Q. Did you suggest to them: Do you want me to
 21 also do a likelihood of confusion survey?
 22 A. In the time allotted there is no way I could
 23 have done a second survey.
 24 Q. So you had time to do one and just one.
 25 A. I had barely enough time to do one, yes.

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- 1 Q. You said you were contacted on the 12th;
2 correct?
3 A. Yes.
4 Q. And your survey, I think you said, was done
5 over a 3-day period; right?
6 A. Yes.
7 Q. Do you know what days that was?
8 A. Yes. It says in the Advance Research Report
9 it was the weekend of the 20th and the 21st.
10 Q. Well, let me back up. You didn't ask the
11 questions; right? You had people do that for you.
12 A. Yes, of course.
13 Q. And you actually had two steps removed.
14 Sometimes you have a company you work with that they
15 ask the questions; and then sometimes there is a
16 company under them, that they tabulate the data; the
17 people at the bottom of the chain ask the questions.
18 Right?
19 A. Yes, usually I do it that way.
20 Q. That's your situation.
21 A. Yes.
22 Q. You never even talked to the people out there
23 who were asking the questions.
24 A. No.
25 Q. I assume you talked to the people who

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- 1 A. You mean did I actually do my own independent
2 tabulations?
3 Q. Yes.
4 A. No, there is no way I had time to do that.
5 Q. Even a cursory look of, 'Well, where is No.
6 82? Which box did that go in?'
7 A. No.
8 Q. So you don't know as you sit here today
9 whether they were done right or wrong.
10 A. I don't have any reason to believe they were
11 done incorrectly.
12 Q. Have you worked with them before?
13 A. No.
14 Q. But it's your understanding is they are
15 reputable and did it right. That's the basis for your
16 testimony.
17 A. Well, that's my understanding. I mean I have
18 looked through some of the questionnaires. I had seen
19 studies where there is definitely going on. I didn't
20 see that here. But, I mean, I haven't examined every
21 single questionnaire and looked through every one. So
22 I'm not sure. It's the best I can do.
23 Q. You've got 200 questionnaires that looked at
24 your test in the secondary meaning survey; this box,
25 right?

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- 1 tabulated the data for you.
2 A. Yes.
3 Q. How do you know what date these questions were
4 asked? What's the basis of that?
5 A. What date they were asked.
6 Q. Uh-huh.
7 A. I'm just taking the word of Advanced Research,
8 the managers of the survey.
9 Q. Would it surprise you to know that some of the
10 questionnaires -- let me put a little context on this.
11 There is an actual questionnaire filed out for
12 each survey participant; right?
13 A. Yes.
14 Q. And you code them in some way. You put a
15 number on them so you can say, 'What did participant 81
16 say about an issue?'
17 A. Correct.
18 Q. And then from that, you tabulate all answers;
19 fair?
20 A. Yes.
21 Q. And Advanced Research Center did that for you.
22 A. Yes.
23 Q. Did you ever check whether the surveys, the
24 questionnaires themselves, matched what the tabulations
25 you got from Advanced Research Center?

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- 1 A. Yes.
2 Q. That's Plaintiff's 49; 200 people looked at
3 that in your survey.
4 A. Yes.
5 Q. And 100 people, not 200, looked at Plaintiff's
6 Exhibit 50, your control.
7 A. Yes.
8 Q. Do you normally use less in the control than
9 you do in the test group?
10 A. Sometimes. It depends. First of all, we
11 didn't have a lot of time to do this survey. We
12 thought it would even be a struggle to get 300 done.
13 On balance it seemed more important to get
14 responses to the test product, the SPLENDIA product,
15 than to the control.
16 I was not expecting a very high number of
17 SPLENDIA mentions to the control; and, therefore, I just
18 didn't think I needed that big of a cell.
19 Q. Going into the study, after you put this
20 control together, you assumed not a lot of the people
21 were going to say SPLENDIA when they see this; not to be
22 a lot of noise for this.
23 A. I didn't think so. In most cases -- it
24 depends on the study. But in this type of study I
25 wasn't expecting a big number. Sometimes if I do an

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1 advertising study, sometimes I do get a very big number
2 on the control side; but not in this study.

3 Q. When you use 100 as the number of survey
4 participants as opposed to 200 -- and it's 400, like
5 Mr. Johnson did for each group -- the data is not as
6 accurate.

7 Is that fair?

8 A. No.

9 Q. It's not fair?

10 A. No.

11 Q. The data is as accurate for 100 people or 400
12 people.

13 A. If the data was carefully done and it was
14 proper, they are equally accurate.

15 Q. Dr. Mazis, you talked about all the college
16 degrees you have in statistics and things like. If I
17 survey four people or I survey 400 people, which am I
18 going to have a better idea of what the overall people
19 in Puerto Rico think? Which is going to be more
20 accurate?

21 A. Well, let me frame it.

22 Q. Could you answer my question? Which is more
23 accurate, less people or more people?

24 A. In general it's always better to have more
25 than less.

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1 how it was done. Mr. Johnson did them all in one in
2 San Juan. I did them around whole the whole island.
3 So which is more accurate? It's a question.

4 So the sample size isn't the only issue.

5 Q. I didn't say it was, either. We'll get to the
6 other issues.

7 You mentioned you didn't look at the studies,
8 the questionnaires themselves. You mentioned, though,
9 you may have looked at a few.

10 Can you ballpark that? 10, 50, 150? How many
11 did you personally look at?

12 A. I'd say about 50.

13 Q. Do you speak Spanish?

14 A. No.

15 Q. Your survey questions that were sent out to
16 people were in Spanish; right?

17 A. Yes.

18 Q. And the ones that were filled out were in
19 Spanish.

20 A. Right.

21 Q. The answers where people said what you
22 associate it with and why, those were in Spanish,
23 because the people who took it and filled it out did it
24 in Spanish?

25 A. Right.

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1 Q. Thank you. And you have, as you tabulated
2 them, 100 people in the control; right?

3 A. Yes.

4 Q. And Mr. Johnson had 400 people look at his
5 test cell; right?

6 A. Yes.

7 Q. 400 people his control cell; correct?

8 A. Yes.

9 Q. I'm sure you've got other reasons; you think
10 they are all different. But on the numbers alone, you
11 would agree with me all other things being equal,
12 looking at 100 people or maybe less, depends, in the
13 control cell is not as accurate as looking at 400
14 people in a control cell -- correct? -- all other
15 things being equal, Dr. Mazis.

16 A. Well, no, I don't agree with it because of the
17 term "accurate" that you're using. You could have a
18 very accurate survey and get a very good estimate with
19 100 people.

20 Q. I could find 100 people who most accurately
21 depict the entire 4,000,000 person population, or I
22 could pick 100 people who all happened to be in one
23 camp, and it would be less accurate for those.

24 Fair?

25 A. Yeah -- I mean, the difficulty is it depends

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1 Q. Were all the questionnaires translated for you
2 to look at?

3 A. The ones I looked at were translated.

4 Q. You had a translation of the questionnaires.

5 A. Right.

6 Q. You know in this case we exchanged
7 questionnaires on Tuesday evening. We sent 800
8 questionnaires over to the lawyers for McNeil. On
9 Wednesday we finally got the questionnaires from
10 McNeil, and they were only in Spanish.

11 Do you know if right now there are English
12 translations of those that were not turned over?

13 A. I don't know. What I looked at was in
14 English. That's my recollection.

15 Q. And you looked at them here in San Juan.

16 A. Right.

17 Q. You said, I apologize, about how many did you
18 look at again?

19 A. I thought about 50. That's my recollection.

20 Q. Did you ever check to see that those 50 were
21 properly recorded? What I mean, somebody said they
22 didn't know, and then when you looked at the data
23 compilation, didn't know, it was filled in.

24 Did you check that?

25 A. No. I don't ordinarily do that.

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